IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1977
No. 77-388

STATE OF WASHINGTON; COUNTY OF YAKIMA; DIXY LEE RAY as Governor of the State of Washington and individually; SLADE GORTON, as Attorney General of the State of Washington and individually; LES CONRAD, GRAHAM TOLLEFSON and CHARLES RICH as County Commissioners and individually,

Appellants,

v.

CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR APPELLANTS

SLADE GORTON,
Attorney General,
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STATE PRINTING PLANT — OLYMPIA, WASHINGTON

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STATEMENT OF THE CASE

In its Statement Of The Case, the Tribe is attempting to relitigate here factual contentions on which it was unsuccessful in the court below. The

Tribe cannot, and does not, contend that the trial court's findings of fact are unsupported by any evidence in the record. A wealth of such support for the trial court's findings does exist, and they must be accepted as verities here. *United States v. Oregon State Medical Soc.*, 343 U.S. 326, 339.

For ease of reference, as well as for emphasis, the relevant portions of the trial court's opinion, constituting its findings and conclusions, are here repeated. The court found, for example:

> "It was not proved at trial that the state or county have discriminated against the plaintiff to deprive any Indian or the plaintiff Tribe of any service or protection, resource or asset afforded under the same state law to other citizens of similar geographic location. Nor was there any evidence of any conspiracy to discriminate. * * *" (Trial court opinion, App. p. 19.)
>
> "The evidence does not support the charge that plaintiff's racial class has suffered from disparity of governmental services offered to other Yakima County and City residents. Nor does the evidence show that other residents of the State of Washington have different treatment than plaintiff's members, or that the system of financing and allocating government services and resources in the State works to the peculiar disadvantage of plaintiff or its members." (Trial court opinion, App. p. 20.)
>
> "There is little evidence that governmental service provided non-Indian residents of the county was not provided Indian residents in like quality and quantity. Plaintiff has failed to make out a case of violation of the right to equal protection by the state or county or their officers. It has not been shown that the state and county

> system of financing and providing general governmental services lacks a rational purpose or that it does not comply with the due process requirements of the Fourteenth Amendment." (Trial court opinion, App. p. 21.)

For purposes of this reply brief a few examples of the Tribe's attempt to relitigate its factual contentions is illuminating. On p. 11 of the Brief of Appellee, the Tribe accurately points out that the trial court, in its findings, noted that adopted Yakima children (that is, presumably, Yakima Indian children adopted by non-tribal parents) suffered "cultural shock," "loss of hunting and fishing rights," "tribal membership," "support while seeking higher education" and "entitlement to share in the annual per capita distribution." No mention, however, is made of the fact that *if* this is the case it is not because of any action whatsoever on the part of the state or county, but *rather* because of the way that the *Tribe* chooses to define its membership requirements.

On the same page of its brief, the Tribe again points out that the trial court noted that the handling of Indian juveniles was "less that perfect." It ignores totally, however, the trial court's notation of one of the reasons for that imperfection. In fn. 5 of its opinion the trial court found that

> "Part of the imperfection may be attributed to a lack of cooperation from the Tribe. The Juvenile Court Services Director testified that he could use more personnel. He has 15 salaried officers and 100 volunteers throughout the county

other than the reservation. So far only one Indian volunteer has responded to his several requests for assistance. There are 15 receiving homes (short term foster homes) in the Lower Valley and one in the Upper Valley. None are operated by the Indians. Since 1971 this department's budget has increased from $286,000 to $424,000 and staff from 5 to 15 probation officers. * * *" (Trial court opinion, fn. 5, App. pp. 23 and 24.)

This brief recital demonstrates that the Tribe's attempt here to retry the facts falls far short of the trial court's findings and the record.

SUMMARY OF ARGUMENT

We do not address, in this reply brief, the equal protection claim of the Tribe, in which the United States, as its amicus, has refused to join. That claim has been amply covered in our opening brief (Wash. Br. 32-41) and our discussion there fully answers the contentions of the Tribe on that issue. (Tr. Br. 68-80) Our primary focus, accordingly, is on the meaning of PL 280, as it relates to both the "disclaimer" issue and the "partial jurisdiction" issue.

(1) We first place the partial jurisdiction problem in proper perspective, by showing the real source of the problem—the tribal option. (Pp. 7-12, infra) In 1963, the Washington legislature decided that it would not unilaterally assume the complete measure of jurisdiction allowed by PL 280. The legislature conditioned the full assumption of state jurisdiction on the consent of the Tribe involved. We then discuss

the possibility of severing that option from the state statute if affording the option to the tribes is held to violate the terms of PL 280.

(2) We show the disastrous impact which total invalidiation of Washington's jurisdictional system would have upon non-Indians, (pp. 13-19, infra) who constitute the large majority of the reservation population both on the Yakima Reservation and statewide.

(3) We answer the contention of the United States that the disclaimer issue has not been settled by this Court. But, recognizing that the Court is free to reopen the issue if it so chooses, we show that the issue has not only been settled, but settled right. (Pp. 19-42, infra)

Our focus, of course,is on § 6 of PL 280, which gives the consent of the United States to the people of any state "to amend, *where necessary*, their state constitution or existing statutes, as the case may be" to remove any legal impediment to the assumption of jurisdiction. Relying upon the legislative history of § 6, and the overall purpose of PL 280, we demonstrate thet § 6 incorporates a *state* standard of necessity, not a federal standard. The purpose of PL 280 was to remove federal barriers to state jurisdiction, not to create or preserve them. Section 6, accordingly, does not require a constitutional amendment if none is required as a matter of state law.

We also show that by reenacting the language

of § 6 in the 1968 Civil Rights Act, the Congress itself adopted our construction of that language.

Under the reading of § 6 urged by the Tribe and the United States, the disclaimer clause, as embodied in both the enabling act and our constitution, would still be in effect. By its terms, however, the disclaimer clause extends only to Indian (*i.e.*) trust lands; thus, if it invalidates anything, the disclaimer clause invalidates Washington's jurisdictional system only as it applies to Indians on Indian lands or trust land. The Washington system remains intact both for non-Indians, no matter where they are found, and for Indians on nontrust lands.

We also discuss the original meaning and purpose of the disclaimer clause, showing that it has nothing to do with jurisdiction of the type contemplated by PL 280.

(4) The partial jurisdiction issue is then taken up. (Pp. 42-54, infra) We demonstrate that meaning of the phrase "in such manner" in § 7 of PL 280 allows Washington to condition total jurisdiction upon tribal consent, as it did in 1963. Not only does Washington's jurisdictional system, incorporating this factor of tribal consent, not offend the overall goal of Congress in enacting PL 280, it enhances it.

We examine § 403 of the 1968 Civil Rights Act, to show (a) that Congress, then fully familiar with Washington's jurisdictional system, clearly considered that system to be valid under § 7 of PL 280 and

(b) that Congress intended that this jurisdictional system was to be preserved.

(5) After disposing of the Tribe's claim that the statute embodying that jurisdictional system is unconstitutionally vague, and that PL 280 itself does not apply to the Yakimas, we set forth the various alternative dispositions which this Court might adopt in this case. (Pp. 54-63, infra) We conclude by refuting the contention of the United States that invalidating this system in toto would have no adverse practical consequences. We show that those consequences would be disastrous not only to non-Indians, but to harmonious relations between Indians and their non-Indian neighbors. (Pp. 64-66)

I. INTRODUCTION

A. The Source of the "Partial" Jurisdiction Problem—the Tribal Option.

In enacting RCW 37.12.010 in 1963, the Washington legislature made a deliberate decision to preserve a measure of tribal self-government, for the Yakima Tribe and for all other Washington tribes as well. It is for this decision to preserve a measure of tribal autonomy that the State is now being challenged.

The court below has held that this decision violates the Equal Protection Clause of the Fourteenth Amendment, but not the terms of Public Law 280. The United States, while doubting that it violates

the former, contends that it most certainly violates the latter. The Tribe, not unexpectedly, contends that the State's decision violates both.

In evaluating these contentions, it is most important to understand precisely what it was that the legislature decided. Perhaps the best starting point is to examine what the legislature could have decided, but didn't, for it had a range of alternatives.

The legislature could have decided to keep the 1957 law intact, without change.[1] Under that law, it will be recalled, tribal consent was necessary for *any* assumption of jurisdiction. Further, in practice and perhaps as a requirement of state law as well, such assumptions of jurisdiction were on an "all or nothing" basis. Once the tribe consented, total jurisdiction was in effect.

Had the legislature decided to continue the 1957 system, obviously no "partial" jurisdiction issue would exist. For state jurisdiction under PL 280 over each reservation would be in effect either totally or not at all.

At the other end of the range, the legislature could have eliminated completely any tribal consent as a condition of total jurisdiction to be effective. In this case, too, no "partial" jurisdiction issue would exist. The only grounds of attack on such a legislative decision would be the "disclaimer" issue, which, at least as framed by the United States and the Tribe,

[1]Chapter 240, Laws of 1957, discussed at Wash. Br. p. 8.

has nothing to do with the "partial" or "total" nature of the jurisdiction being assumed.

In fact, the legislature selected a third alternative. The legislature obligated and bound itself to assume total jurisdiction, viz., the full jurisdiction authorized under PL 280. But the full effectiveness of that jurisdiction was conditioned upon tribal consent as a sensitive recognition of the desire of some tribes for a maximum degree of autonomy.[2]

We do not here wish to imply any criticism of the decision made by the Yakimas or by any other tribe.[3] After all, our legislature gave them the right to make that decision, and deliberately refrained from making it for them. We are certain that the

[2]At Wash. Br. p. 34-37, we show exactly what jurisdiction was conditioned on tribal consent and what jurisdiction was not. We need not repeat this discussion here.

[3]Nor do we here wish to engage in a battle of semantics or labels, on the issue of whether jurisdiction over tribes such as the Yakimas should be called "partial" or "total." In *Quinault v. Gallagher*, 368 F.2d 648, at 657, 658 (9th Cir. 1966) the court characterized the 1963 statute as follows:

> "* * * We do not read that act as constituting only a partial assumption of jurisdiction. The state therein indicates its willingness to extend criminal and civil jurisdiction over all Indians and Indian territory, reservations, country and lands within the state, it being provided, however, that as to some matters concerning some Indians, there must first be a tribal resolution and a gubernatorial proclamation. * * *
> "In our opinion, the indicated condition precedent to the exertion of state jurisdiction as to some matters concerning some Indians involves no violation of Public Law 280. * * *"

In our view, the most important sentence here is the last, not the first. As shown by this statement, the critical question is whether the "indicated condition precedent" involves a violation of PL 280 (or of the Equal Protection Clause). We have no quarrel with the use of the term "partial" so long as it does not distract one from focusing on this question. The important point is to understand that the jurisdiction is "partial" solely because of the existence of the "condition precedent" and that it is the Tribe's choice, not the State's which makes that jurisdiction effectively "partial."

legislature gave the tribes that choice in the full expectation that some would make it one way, and some would make it the other. And that is exactly what has happened.

Also we here wish to place into proper focus the principal legal questions involved in the "partial" jurisdiction issue.

First, does PL 280 forbid the legislature from giving the tribes the choice that it did? More precisely, under PL 280, were the only alternatives legally available to the legislature in 1963 the two which we have previously described, each at the opposite end of the range of alternatives? Or was there another alternative available, viz., total jurisdiction, the full effectiveness of which was subject to tribal consent? Deference to tribal choice, we submit, is not forbidden by PL 280.

Secondly, by choosing this third alternative, and thereby, leaving room for tribal choice, did the legislature violate the constitutional rights of the tribal members arising under the Equal Protection Clause, at least in those cases in which the tribe chooses to leave the state jurisdiction partially ineffective, as has the Yakima Tribe? This third alternative, we submit, violated no constitutional rights.

If our submissions on one or the other of these two questions are rejected, then a further question must be answered—though not necessarily by this

court. What should be judicially stricken? RCW 37.12.010 in its entirety? Or just the offending element, *i.e.*, the element of tribal choice? The answer to that question is obviously one of utmost practical importance. And, as even the Ninth Circuit recognized, this severability question is really one of state, not federal, law.[4]

The United States invites the Court, as we do, to consider the "practical consequences" (U.S. Br. p. 87) of whatever its decision might be. (See U.S. Br. pp. 54-59, 87-88.) This severability question raises one of the most important of those practical consequences. This same question also shows the paradoxical nature of the argument of the United States and the Tribe on the partial jurisdiction issue. Their complaint is cast in terms of the State taking *too little* jurisdiction, *i.e.*, taking "partial" instead of "total." But the real position is that the State took *too much*, *i.e.*, that the State took any at all.

The apparent complaint can be easily solved, by severing from RCW 37.12.010 the language which affords the tribal option. That result, we need hardly point out, would not satisfy the Tribe. But it would

[4]We discuss the severability question in more detail at pp. 60-63, infra. The question would be essentially the same if RCW 37.12.010 had been restructured slightly. The legislature could have just switched the effect of tribal inaction. It could have provided that in the absence of a tribal request for partial jurisdiction, the result would be total jurisdiction. The Yakimas undoubtedly would have made such a request, and the situation would be exactly the same as it is now. But the severability question then might have been put in sharper relief.

certainly solve any partial jurisdiction problem—if that be the real problem. One more than suspects that it is not.

Indeed, the United States is perfectly correct in suggesting that from the point of view of a Tribe, such as the Yakimas, which looks upon state jurisdiction, however limited, as a terrible thing, the tribal option constitutes a Hobson's choice. (U.S. Br. p. 66, 67.) If any jurisdiction, however little, is bad, more jurisdiction is certainly worse, not better.

But what counts, we submit, is the point of view of Congress, not the Tribe. And the Congress which passed PL 280 was intent upon accomplishing the transfer of jurisdiction over Indian reservations to the states, not preventing such transfers.

Here the Tribe and the United States take, as they must, a 180 degree turn. They argue that Congress considered total state jurisdiction as good—*i.e.*, as permissible under PL 280—and partial jurisdiction as bad—*i.e.*, as impermissible.

We end with a simple observation: If, as argued by the Tribe and the United States, the existence of the tribal option violates this congressional intent, because it results in partial jurisdiction, the solution is simple. The congressional intent can be fully accomplished by severing the option.

B. The Scope of the Problem—The Impact on Non-Indians.

From a reading of the briefs of the United States and the Tribe, one could easily gain the impression that only the interests of Indians are involved in this case. Such an impression would be completely wrong.

First, some facts. The record shows that there are approximately 3,000 members of the Yakima Tribe resident on the Yakima reservation, and approximately 22,000 non-Indians. (See Wash. Br. p. 23.) The Indians thus constitute about one-eighth of the reservation population.[5]

Such a pattern is far from unusual on Washington reservations. As this court is already aware from *Oliphant v. Suquamish Tribe*, No. 76-5729, decided March 6, 1978, on the Port Madison Reservation there are about 3,000 non-Indians and about 50 Indians.[6]

On the Puyallup reservation—if there still be one[7]—there are less than 1,000 resident tribal members, and approximately 25,000 non-Indian residents.[8] On the Colville reservation, there is a total

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[5] If we are following correctly the arithmetic of the United States (U.S. Br. 3, 57 and 87), the United States asserts that there are approximately 6,000 tribal members resident on the reservation. We do not know where this figure comes from, and the United States does not tell us. In any event, it is contrary to the record, and to the truth. The United States is correct, however, in its figure of 22,000 for the non-Indian population, which it refers to as simply "other [reservation] residents." (U.S. Br. p. 3.) And after this interesting reference, no more is said about these "other residents," save on the charts at App. B.

[6] *Oliphant*, n. 1.

[7] *Cf., Dept. of Game v. Puyallup Tribe*, 433 U.S. 165, 173, n. 11.

[8] See 1970 U.S. Dept. of Commerce Census. According to that census, tracts for this area in Pierce County, Washington, nine census

population of approximately 7,000, of whom approximately 3,200 are tribal members.[9]

On some of the smaller reservations, on the other hand, the Indian population outnumbers the non-Indian.[10]

Taking all Washington reservations as a whole —including the Yakima and Puyallup—we would estimate a total non-Indian population of approximately 58,000, and a total Indian population of approximately 13,500.[11] Statewide, then, Indians constitute less than a fifth of the total reservation population of approximately 71,500.

What are the legal consequences for these reservation non-Indians if Washington's assumption of jurisdiction is struck down? The Tribe touches on them only in passing (Tr. Br. p. 20) and the United States mentions them in Appendix, B, Chart 1 of its

tracts are completely within the boundaries of the claimed Puyallup Reservation. (Nos. 601, 602, 621, 62, 633, 705, 708, 709 and 710. It reflected at that time a total population of 22,848 with an Indian population of 579. When the proportionate part of the three census tracts which lie partially within and partially without the boundaries of the claimed reservation are taken into consideration, the result is a total population of 26,666 (at the time of the 1970 census) with an Indian population of 636.

[9]See Motion to Dismiss or Affirm in *Confederated Tribes of the Colville Indian Reservation, et al. v. State of Washington, et al.*, No. 78-60, p. 5.

[10]This is the case, for example, on the Lummi and Makah Reservations. See reference at n. 9.

[11]In making this estimate, population figures for reservations not specifically mentioned are taken from the Amicus Brief of The National Tribal Charimen's Assn. Appendix A, in Oliphant. We dispute, of course, the statement of the United States that there are 20,000 reservation Indians. U.S. Br. 57. Again, we do not know where that figure comes from, and the United States does not tell us. Nor does the United States even purport to give a figure for the state-wide non-Indian reservation population.

brief, though not in the text. We have attempted to spell them out at Wash. Br. pp. 20-24.

We need not repeat that discussion here, other than to recall the general result: Federal law, and only federal law, would be applicable to all of these non-Indians pursuant to 18 U.S.C. 1152, except to the extent that the offense falls under the *McBratney* exception to § 1152,[12] in which case only state law would be applicable.

Whether the federal government will obtain the resources—the police officers, the prosecutors, and the judges—to shoulder this responsibility under such a result is far from clear. One of the principal reasons for the passage of PL 280 in the first place was the breakdown in law and order on Indian reservations, a breakdown for which the federal government was in great part responsible.[13]

Twelve years after the passage of PL 280, in 1965, the federal government was still having difficulty in fulfilling its law and order responsibilities. In opposing a bill which would have given the federal government concurrent jurisdiction over crimes by non-Indians against other non-Indians, the Acting Secretary of Interior stated in a letter to the Chairman of the Senate Judiciary Committee:

[12]*U.S. v. McBratney*, 104 U.S. 621.

[13]"As one commentator has explained, 'federal law enforcement was typically neither well-financed nor vigorous.' " (U.S. Br. 74) See also, Hearings Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs on H.R. 459, H.R. 3235 and H.R. 3624. 82nd Cong., 2nd Sess (1952) p. 16.

"As a practical matter, the Federal courts are reluctant to add to their crowded dockets offenses of this kind, many of which are in the misdemeanor category. The U.S. attorneys are reluctant to prosecute for the same reason. At the present time, the Department is having difficulty in funding the meager law and order programs carried on jointly by the tribes and the Bureau of Indian Affairs, and it is improbable that additional investigative, detention, trial, and appeal expenses could be justified." (Hearings on Constitutional Rights of the American Indians Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. (1965), p. 321.

There is no evidence that the situation is any different in 1978.[14]

[14]Such evidence as we can find suggests that the situation has not changed. As recently as March 9 of this year, in its testimony on S. 2502, the Tribal-State Compact Act of 1978, the Justice Department asked for an amendment to the bill "* * * to assure that S. 2502 cannot be construed to authorize states and tribes to give additional criminal law enforcement responsibilities to the Justice Department." Statement of Sanford Sagalkin, Hearings Before the United States Senate Select Committee on Indian Affairs, 95th Cong. 2d Sess. (1978), p. 115. The reason for this amendment was stated by Mr. Sagalkin:

"The reasons for this are very simple.

"Changes in Federal jurisdiction require knowledge about the particular U.S. attorneys' offices, particular courts, the backlog that may exist in the courts, marshal services, and so forth. It requires a planning and budgeting process that should be fed into any decisions on changing Federal authority." Hearings, at p. 118.

Similar concern was voiced in 1975 by Jerry C. Straus, counsel for various Indian tribes, in his testimony on S. 1, Hearing Before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary, United States Senate, 94th Cong. 1st Sess. 1975 p. 241.

"Moreover, the implementation of the proposed extension of federal criminal jurisdiction would aggravate the present inability of federal prosecutors to enforce effectively the laws regarding offenses by non-Indians on Indian lands. We continue to doubt the adequacy of present federal resources to assume successfully any additional criminal enforcement responsibilities on Indian lands. * * *"

If the status quo is to be changed, by an expansion of federal jurisdiction, the change should be made by the Congress, which can take all of these practical problems into account.

It might be argued that federal jurisdiction over non-Indians is not a serious problem, because of the *McBratney* exception to § 1152.[15] But this argument founders on the fact that the scope of this exception is completely uncharted in a huge area of criminal offenses, *i.e.*, the area of "victimless" crimes.

The problem is best illustrated by the facts in *Oliphant*. Mr. Oliphant allegedly got into a fight, and was supposedly disturbing the peace; we do not know whether any Indians were involved until the tribal police tried to break the fight up. Mr. Belgarde was allegedly engaged in reckless driving, endangering the population at large rather than any specific person.

Under Oliphant, Mr. Oliphant and Mr. Belgarde should have been arrested by someone other than tribal police and tried by some court other than a tribal court. But should it have been state or local police? And a state court? Or should it have been federal officers and a federal court?

[15]While we assume, along with the United States, the continued vitality of the *McBratney* exception, Interior appears to have had its doubts. As stated in this same letter from Interior to the Chairman of the Senate Judiciary Committee:

"Although the language of 18 U.S.C. 1152 and 13 seems to indicate that the Federal courts have jurisdiction over offenses between non-Indians, the judicial decisions leave that conclusion somewhat uncertain. The present Criminal Code was enacted in 1948. The substance of sections 1152 and 13 was contained in earlier law, but it was stated in different language. Under the earlier law, the Supreme Court held that the State has jurisdiction over such offenses (*People ex rel Ray v. Martin*, 326 U.S. 496 (1946), and that the Federal Government does not have jurisdiction (*United States v. McBratney*, 104 U.S. 621 (1881)). Whether the enactment of the 1948 Criminal Code changes the situation is not clear." (1965 Hearings, p. 320)

As we point out in our opening brief (Wash. Br. p. 22, n. 6), we don't know. The United States doesn't know either. See U.S. Br. App. B, Chart 1, discussion of Class 6-10, which covers victimless crimes, and states "But see cases 11-15." Cases 6-10 are, according to the United State's chart, under state law, and Cases 11-15 are under federal law. Where do the cases of Mr. Oliphant and Mr. Belgarde fall? The United States is as uncertain as we, as the "But see * * *" indicates.

Cases such as these are the normal, day-to-day stuff of law enforcement. Yet the United States and the Tribe argue for a result under which no one knows what authority, state or federal, is responsible for handling these cases.

The practical law enforcement problems involved in geographical checkerboarding are, we suggest, miniscule when compared with those involved in determining whether federal or state law applies in a specific case involving a non-Indian offender, such as Mr. Belgarde or Mr. Oliphant.[16]

The *McBratney* exception, we submit, creates more problems than it might solve.

Finally, if RCW 37.12.010 is invalidated *in toto*, federal law enforcement responsibility must be extended not only to a whole new class of offenses by non-Indians, but also to a whole new class of offenses

[16]Any "checkerboarding" problem involves only Indian offenders. Under RCW 37.12.010, non-Indian offenders are subject to state jurisdiction wherever the offense takes place.

by Indians. The federal government would have to protect not only Indians from non-Indians, and Indians from Indians, but non-Indians from Indians as well. And this protection would have to be afforded on every portion of every reservation, be it in the cities of Wapato and Toppenish, located on the Yakima Reservation,[17] or in a portion of the city of Tacoma, located on the Puyallup Reservation, or in the community of Suquamish, located on the Port Madison Reservation.[18]

Perhaps the federal government is up to the task. But history affords little reason for the 58,000 non-Indians on our reservations to be hopeful.

II. THE DISCLAIMER QUESTION HAS BEEN SETTLED BY THIS COURT AND SETTLED CORRECTLY.

A. The Question Has Been Settled by this Court.

First, a comment on the Court's formulation of

[17]In its brief, at p. 14, the Tribe asserts that "there are no non-Indian communities located within the exterior boundaries of the reservation." How it can make such an assertion in light of its own concession in Tr. Br., p. 14, note 20, immediately following the quoted language, of the respective non-Indian and Indian populations of Harrah, Toppenish and Wapato (non-Indian population of each town, 91%, 94%, 91%, respectively), all located entirely within the reservation, is baffling indeed. If the Tribe is relying on the court's discussion of the term "non-Indian community" in *U.S. v. Mazurie*, 419 U.S. 544, such reliance is misplaced.

[18]RCW 37.12.010 does not, of course, completely protect the non-Indian from the Indian offender if the Tribe has not consented to "total" jurisdiction. For the non-Indian victim may be on trust, *i.e.*, Indian land, when the offense takes place, in which case he must look to the federal government for protection in major offenses and to the Tribe for minor offenses. But if he is on nontrust land, *e.g.*, in his own home, he is afforded state protection.

the issue in its Order of February 7, 1978, noting probable jurisdiction. That formulation reads:

> Whether the partial geographic and subject matter jurisdiction exercised by the State of Washington within the Yakima Indian reservation pursuant to Public Law 280 violates either the statutory requirements of Public Law 280 or the Equal Protection Clause of the Fourteenth Amendment."

The disclaimer question has nothing to do with the "partial" nature of the State's jurisdiction over the Yakima reservation. If disclaimer is an issue, it is one which arises whether that jurisdiction be partial or total.

Secondly, contrary to the assertions of the United States, the issue has been settled by this Court. (U.S. Brief pp. 16-18). In *Makah Indian Tribe v. Washington*, appeal dismissed 397 U.S. 316, the Motion to Dismiss or Affirm (p. 8) stated:

> "The main issue involved in this appeal is whether the State of Washington has the authority under its constitution to assume jurisdiction over Indian tribes and reservations within this state pursuant to the provisions of Public Law 83-280 by legislative enactment and without amending Article 26 of the State Constitution. * * *"

We do not see how the question could have been presented more clearly.

This Court may have subsequently opened the question again; for the United States is correct in stating:

> "* * * [t]his Court treated the question as still open in *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 177-178, and remanded a subsequent case for the [Washington] State court to consider it. *Tonasket v. Washington*, 411 U.S. 451." (U.S. Br. p. 17)

But in dismissing the second appeal in *Tonasket*, after the State court had considered the question on remand and in dismissing the appeal in the companion case, *Comenout v. Burdman*, 420 U.S. 915, the Court closed the question once again.[19]

We find it difficult to believe that, in dismissing the second appeal in Tonasket, this Court did not consider as being before it for a decision the very question which it had told the State court to decide, and which the State court did in fact decide. The question did not somehow become lost on its return trip to this Court.

The United States also suggests that in *Comenout v. Burdman*, 420 U.S. 915, which was decided in the same Order as *Tonasket*, the question was viewed as insubstantial because it involved an order for the *temporary* custody of an Indian child and might have become moot.[20] (U.S. Br. pp. 17, 18). In fact, the case involved more than temporary custody.

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[19]We again remind the court, as we did in our opening brief, p. 30, that at the time of its dismissal of these appeals the court had been presented with all of the so-called "newly discovered legislative history" relied on so heavily by the Tribe, and by the United States in urging the court to now give this question plenary consideration.

[20]That the government can make such a suggestion we find astonishing. Certainly the appellants in *Comenout* did not think the issue moot, for they were strenuously attempting to have the deprivation order overturned long after the expiration of its *initial* six-month term.

The Department of Social and Health Services had petitioned the trial court for an order of *permanent deprivation*. 84 Wn.2d 192, 193, 525 P.2d 217. And the Indian parents then filed for a writ of prohibition against the Department and the trial court to stop them from proceeding any further in the matter. The case was not moot then, and in fact never became moot.[21]

Though the question is settled, the Court is certainly free to open it up again. But in deciding whether to do so, the distinction made by Justice Brandeis in *Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, provides the proper guideline:

> "Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. * * * This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. * * *"
> (285 U.S. at 406-408)

The disclaimer issue is not a constitutional issue; it is purely statutory. Thus, application of *stare decisis* is all the more appropriate here. If there has been error in settling this issue, it has been an error uniformly made by this Court and all other courts

[21]The Department has informed us that now, seven years after commencement of *Comenout*, the Indian children are still under the custody of the Department and have been placed by the Department in state-supported foster care with Quinault relatives on the Quinault Reservation.

that have directly ruled on the issue. It is also an error that has been around for a long period of time, since at least 1959.[22]

Congress has had ample time to correct the error, if it be one. But as we shall show at pp. 46-54, *infra*, Congress not only failed to reject the holdings of *Paul* and its progeny, but in 1968 impliedly adopted them, with full knowledge of exactly what it was doing.

We turn, then, to the merits of the question, to show that the question is not only settled, but "settled right."

B. The Issue Has Been Settled Correctly.

1. *The Meaning of "Where Necessary" as Used in Section 6 of Public Law 280.*

For ease of reference, we quote again the language of § 6.

> "Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, *where necessary*, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be." (Emphasis supplied)

[22]*State v. Paul*, 53 Wn.2d 789, 337 P.2d 33 (1959) was decided that year, and was the first of the cases ruling on this issue.

What is the meaning of this phrase "where necessary"? More precisely, does it incorporate a federal standard of necessity? Or a state standard?

The United States and the Tribe apparently contend that it incorporates a federal standard,[23] and that under this federal standard a state with a disclaimer clause, such as Washington, must expressly remove the disclaimer language from its constitution before assuming any jurisdiction under PL 280.

We contend that it incorporates a state standard, and that the question of the necessity of a constitutional amendment is one of purely state law.

The Congress, of course, could have incorporated a federal standard. Indeed, it could have said to the so-called disclaimer states—and even to the non-disclaimer states: "We don't care how your constitutions read or how your courts might interpret them. To assume jurisdiction, you must refer the matter to the voters for their approval."

Did the Congress, in § 6, say something like that to Washington? Or did it say, instead: "Do whatever you have to do, in order to assume jurisdiction. If your constitution, as interpreted by your courts, contains an impediment which prevents you from assuming jurisdiction and if it requires our permis-

[23]We say "apparently" because the United States attempts to explain away the insertion of the phrase "where necessary" as a mistake, based upon Congressional ignorance. U.S. Br. p. 36. Since the phrase does not fit the argument, it is to be effectively dropped out of the statute.

sion to remove that impediment, you have our permission."

The language of § 6 does not tell us whether the standard of necessity is to be federal or state. But that fact, in itself, is significant. If a federal standard were intended, one might reasonably expect that the statute would clearly set out what that standard is, instead of just cryptically saying "where necessary" and nothing more.

This consideration, however, is hardly dispositive; and accordingly, we turn to the legislative history for such assistance as it gives in answering the question.

2. *The Meaning of the Phrase "Where Necessary" in Light of the Legislative History: The June 29 and July 15, 1953 Hearings.*[24]

We start with a point of agreement. Assume that a stranger had come into these hearings[25] and asked the question: "Would Washington have to amend its constitution in order to assume jurisdiction?" The answer from those assembled would have been "yes."

But we now reach the critical point of disagreement. For the Tribe and the United States, that is the end of the matter. We, however, believe that our

[24]The transcript of these hearings is printed as Appendix I to the Tribe's Brief; and we shall cite to the pages of that appendix. This same transcript, we again note, was provided to this court in *Tonasket* and *Comenout* when it dismissed those appeals.

[25]The hearings appear to be really "mark-up" sessions of the committee.

stranger must also ask the next question: "Why? Is your answer 'yes' because that's the way you want it to be, as a matter of federal law and as a federal requirement? Or is it 'yes' because that is your understanding of state law?"

The answer, we submit, would be: "Because of our understanding of state law."

The important transcript is that of the July 15 meeting, when the actual text of §§ 6 and 7 were before the subcommittee. Immediately after Mr. Westland, a Congressman from Washington, had read to the members the proposed language of § 6, the chairman, Mr. D'Ewart raised the question:

> "Mr. D'Ewart. I do not think we have to grant permission to a state to amend its own statutes.
>
> "Mr. Abbott. (Counsel) Mr. D'Ewart, I believe the reason for this is that in some instances it is spelled out both in the constitution and the statutory provisions as a result of the Act and it may be unnecessary, *but by some state courts it may be interpreted as being necessary.*" (Emphasis supplied) (Hearings I-25, I-26)

For Mr. Abbott, at least, the term "where necessary" meant "where necessary under state court decision."

For Mr. Westland, as well, the purpose of § 6 was not to impose some federal requirement, but to facilitate removal of any state impediment:

> "Mr. Westland. I believe the state of Washington was consulted on this matter and they indicated their readiness to take over on this

> jurisdiction as far as criminal and civil was concerned, *but they do have a constitution there that requires this amendment* [Sec. 6] in *order that they can get at it.*" I-26 (Emphasis supplied)[26]

Mr. Westland's understanding clearly was that the impediment existed as a matter of *state* law.

It was also his understanding that in order to "get at it," permission of the Congress was necessary because of the Enabling Act.

This was also the understanding of the other committee members.

> "Mr. Berry. Mr. Chairman, [D'Ewart] then we get right back to your objection.
> "Congress does not have to give consent to a state to amend its constitution or its laws.
> "Mr. Dawson. Because when the Enabling Act was passed, they said this state can become a state upon certain conditions, except for the Enabling Act. In other words, we restrict what they can put in their laws and constitution to begin with. The state cannot go any further than their Government lets them go when they become a state, so now we are lifting one of those restrictions." Hearings, I-27, I-28.

How the subcommittee viewed the problem is quite clear. In the constitutions or statutes of states such as Washington, there were impediments to these states assuming jurisdiction. This situation existed, not because that was the way the subcommittee

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[26]The United States apparently views the phrase "this amendment" as referring to an amendment of Washington's Constitution, and not to the proposed amendment to the bill. (See U.S. Br., Paragraph beginning on p. 36 and ending on p. 37). This is clearly a misreading of what Mr. Westland said.

wanted it, but rather because that was the situation as a matter of *state law*. Further the subcommittee understood that under the enabling acts, federal permission was necessary in order to change state statutes or constitutions. And in order to accomplish that change, permission was to be given in § 6. The purpose of § 6 was to "lift" restrictions—to use the term of Mr. Dawson—in order that states could "get at" any restrictions under state law—to use the term of Mr. Westland. The purpose was not to create, as a matter of federal law, any restrictions, it was just the opposite—to remove them.

The subcommittee clearly believed that these state law restrictions existed in Washington; and it probably believed that they could be removed only by an express constitutional amendment, approved by the voters. But the subcommittee gave no indication that these restrictions were to be locked in as a matter of *federal* law. Again, the purpose was to remove federal restrictions, not to create them.

3. *The Meaning of the Phrase "Where Necessary" in Light of the Overall Purpose of PL 280.*

The United States and the Tribe view § 6 as constructing an obstacle course. Its purpose is not to facilitate state assumption of jurisdiction, but rather to create a federal requirement, independent of any state requirement, for an express constitutional amendment, approved by the voters.

Again, we must ask "Why?" Why would the

Congress create such an obstacle course? The United States notes that Congress could have unilaterally overridden the Washington disclaimer clause, had it so chosen (U.S. Br. p. 32) The United States then engages in interesting imaginings as to why Congress chose not to. These imaginings are worth quoting:

> "*What considerations led to this decision, it is not easy to say.* It may be that the 83d Congress, despite its "assimilative" viewpoint, thought it important to assure the full-fledged consent of the State's citizenry before this important step was taken, carrying with it substantial new responsibilities, among them a heavy additional financial burden. Popular approval may have been deemed especially appropriate in the "disclaimer" States on the assumption that the disclaimer provisions evidenced an unusual degree of white-Indian hostility. It is not inconceivable that some who voted for Public Law 280 saw in the requirements of Section 6 a measure of protection for the Tribes against over-zealous legislatures. Others no doubt simply deemed it "fitting and proper" that what had been settled by the people of the State as a whole should be undone only by them.
>
> *We cannot know with assurance what informed the legislative mind.* * * *" (U.S. Br. p. 32-33) (Emphasis supplied)

There is not one bit of evidence, in either the text of PL 280 or in any of the legislative history, that these considerations "informed the legislative mind."[27] And the difficulty encountered by the United

[27]In fact, we do know what informed the legislative mind; the July 15 hearing tells us. The subcommittee perceived a problem under state law, a problem which, in their understanding, could only be solved by the states if federal law (the enabling act) were first changed. So the change was made. It is that simple.

States in trying to ascertain "what considerations led to this decision" strongly suggests that this was not the decision at all—as indeed it was not.[28]

The overall purpose of PL 280 was succinctly stated in a 1975 Report of the Senate Interior Committee.[29]

> "It should be noted that the bill as amended accomplished a transfer of jurisdiction only in the five specified states. In all other states the transfer of jurisdiction could only be accomplished upon the initiative of the state involved. However, *no barrier to the assumption of jurisdiction by a state other than its own willingness to do so was erected by the bill:* * * *" (Emphasis suplied)

This statement echoes the words of Mr. Abbott, subcommittee counsel, in the July 15, 1953 hearing:

> "The intention was to grant it [jurisdiction] to all states at such time as they were willing to take it." I-26.

This purpose of removing, rather than creating, barriers to state jurisdiction is strikingly shown by a subsequent comment of Mr. Abbott. The subcommittee is still discussing § 6:

> "Mr. Dawson. That brings up another question: Whether your wording should refer to the

[28]Observe that some of the considerations suggested by the United States would be as applicable to non-disclaimer states, such as Nevada or Idaho (*cf.*, U.S. Br., note 15) as they would to disclaimer states. The problems of "a heavy additional financial burden" and "over zealous legislatures" would be no less great in the non-disclaimer states. Yet, no requirement of voter consent was established for these states. Indeed, these same considerations would be equally applicable to the *mandatory* states.

[29]Background Report on Public Law 280, 94th Cong., 1st Sess., Senate Committee on Interior and Insular Affairs (1975), p. 21.

> Enabling Act. You say "We hereby give our consent for them to amend their state constitution." Their state constitution was based upon the Enabling Act. In other words, they followed that. I wonder whether we should have something in there to say "Not withstanding any restrictions in the Enabling Act, consent is hereby given to amend their state constitution."
>
> "Mr. Abbott. (Counsel) I believe that clause notwithstanding any provisions of the Enabling Act" for such states might well be included. *It would make clear that Congress was repealing the Enabling Act.*" I-27 (Emphasis supplied)

Whether the disclaimer portion of enabling act was technically "repealed" or not is debatable; like Article XXVI, Washington's constitutional disclaimer clause, it is still "on the books." What is not debatable is that that clause was to have no more force or effect. Mr. Dawson's amendment, which was adopted, and Mr. Abbott's comment on that amendment, make this clear. The purpose was not to create or even to preserve any federal barriers, even those arising from the enabling act. Rather the purpose was to remove them.

Yet the underpinning of the whole argument of the United States and the Tribe on the disclaimer issue is this: The legal ghost of the enabling acts goes on, turning the question of what the state constitutional disclaimers mean and how they can be nullified into questions of rigid, unbending federal law.

We cannot overlook, in considering the purpose of PL 280, the "termination fever"—to borrow a

phrase from the United States (U.S. Br. p. 73)—of which PL 280 was just a part. Congress was intent upon terminating its special responsibilities to Indians, and assimilating them into society at large. See, generally H.R. Rep. 848, 83rd Cong. 1st Sess. (1953), "Background History of this Legislation". PL 280, while stopping short of termination and clearly preserving treaty rights, was designed to transfer jurisdiction from the federal government to the states as expeditiously as possible.[30]

The drafters of PL 280, however, had one great concern; before any such transfer, the state had to be able and willing to accept jurisdiction, and had to indicate that ability and willingness by affirmative legislative enactment or—if necessary under state law—by actual constitutional amendment. The drafters wanted no void in jurisdiction, either as a legal or as a practical matter.

As stated in S. Rep. No. 699, 83rd Cong. 1st Sess., p. 5 (The Senate report adopts House Report 848 verbatim):

> "As a practical matter, the enforcement of law and order among the Indians in the Indian country has been left largely to the Indian groups themselves. In many States, tribes are not adequately organized to perform that function; consequently, *there has been created a hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility.*" (Emphasis supplied)

[30]The United States is surely right when it states " * * * the congressional mood was plainly in favor of ending the special status of Indians and to pull down the reservation fences that kept out State law." U.S. Br. p. 73.

In *Kennerly v. District Court of Montana*, 400 U.S. 423, 427, this Court emphasized the same point:

> "* * * Nor was the requirement of affirmative legislative action an idle choice of words; the legislative history of the 1953 statute shows that the requirement was intended to assure that state jurisdiction would not be extended until the jurisdictions to be responsible for the portion of Indian country concerned manifested by political action their willingness and ability to discharge their new responsibilities. See HR Rep. No. 848, 83d Cong. 1st Sess, 6, 7 (1953)"[31]

Congress did not wish to override any existing state impediments to state assumption of jurisdiction, even though, as observed by the United States, Congress could have done so. U.S. Br. 32. Similarly, Congress did not wish to force jurisdiction upon a state unwilling to take it. For that would have resulted, as a practical matter, in a continuation of the "hiatus in law enforcement authority" (S. Rep. No. 699, p. 5, *supra*) which PL 280 was designed to eliminate. The dangers stemming from legal authority and an unwillingness to exercise that authority had been amply demonstrated to Congress by the

[31]This fact is itself important, for Montana is a "disclaimer" state. Montana and Washington became states under the same enabling act. Enabling Act of 1889, 25 Stat. 676. Far from supporting the conclusion that PL 280 requires Washington (or Montana) to amend its constitution, *Kennerly* supports just the opposite conclusion. See also this court's statement in *Seymour v. Superintendent*, 368 U.S. 351 at 357, note 13:

> "This Act [Act of July 24, 1956, 70 Stat. 626] followed closely a 1953 Act, 67 Stat 588, 590, § 7 of which provided a way in which the State of Washington could acquire jurisdiction over the reservation by meeting certain conditions prescribed there by Congress." (Emphasis supplied)

federal government itself. Congress wanted no more of it.

On the other hand, the Congress did not wish to create impediments or barriers, as a matter of federal law, if none existed as a matter of state law. Removal of federal barriers, not their creation or preservation, was the theme. The policy of Congress, in short, was not as schizophrenic as the United States and the Tribe imagine it to be.

4. *The Meaning of "The Consent of the People" as Used in Article XXVI of the State Constitution.*

If our submission so far be correct, § 6 contemplates the passage of a constitutional amendment if, and only if, a constitutional amendment is necessary as a matter of state law. And our supreme court has uniformly held that such an amendment is not necessary.

We are not here arguing, however, that the disclaimer clause in Article XXVI need not be made inoperative—though we shall so argue subsequently. That argument turns on the meaning of the "absolute jurisdiction and control of the Congress" disclaimer clause language. Does that language encompass jurisdiction of the type contemplated by PL 280? We here assume, *arguendo*, that it does, and address a quite different question: How can that clause be made inoperative, *as a matter of state law*, without an actual constitutional amendment.[32]

[32]Whether that language encompasses jurisdiction of the type contemplated by PL 280 is discussed in Appendix A.

Strictly speaking, the question is irrelevant. If, as our supreme court has held repeatedly, a constitutional amendment is not necessary to make the clause inoperative, that is the end of the matter. We examine the question, nevertheless, to show the reasonableness of those decisions of our supreme court.

The structure of Article XXVI should first be noted. Article XXVI does not begin by saying, "The people inhabiting this state do agree and declare that they forever disclaim [etc.] * * *" If that were how it actually began, then it would remain effective, unless and until repealed, as is the case with most other constitutional provisions.

But, Article XXVI actually begins by stating: "The following ordinance shall be irrevocable without the consent of the United States and the people of this state:

"That the people inhabiting this state do agree and declare that they forever disclaim [etc.] * * *"

In this respect, Article XXVI is not unlike Article XXII, relating to legislative apportionment. Section 1 reads:

> "Until otherwise provided by law, the state shall be divided into twenty-four (24) senatorial districts, and said districts shall be constituted and numbered as follows: * * *"[33]

[33]Such a structure is not unknown in the Federal Constitution. Section 1 of Amendment XX reads:

> "The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the third day of January, *unless they shall by law appoint a different day.*"

For Article XXII to become inoperative, it is not necessary to repeal it through a constitutional amendment. All that is necessary is legislative action. Article XXII remains as part of the constitution; but, by its terms, it has been superseded by statute.

So too with the disclaimer clause in Article XXVI. It can become inoperative, while still remaining "on the books." The consent of the people must be given, of course, before this can occur. But how that consent is to be manifested is a question of state law, not federal.

Yet the concept of "the people" acting through their elected representatives is not a stranger to federal law. In fact, that concept is embodied in §§ 6 and 7 of PL 280.

The proviso in § 6 reads as follows:

> "* * * PROVIDED, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State *until the people thereof have appropriately amended their State* constitution or *statutes* as the case may be." (Emphasis supplied)

Section 7, in turn provides:

> "The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner *as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.*" (Emphasis supplied)

The use of the term "the people of the State" in § 7 is explained by the United States as follows:

> " * * * To be sure, some confusion is created by using the same words [the people] in Section 7, where, presumably, the legislature alone is authorized to 'obligate and bind the State.' This may be a mere slip of the pen, unthinkingly reproducing the formula of Section 6. * * *" US Br. p. 35.

Congress should not be presumed to engage in making "slip[s] of the pen." And the confusion is dispelled by admitting the obvious: Congress fully recognized that "the people" could act through their elected representatives. The state supreme court come to the same conclusion, as a matter of state law.

5. *The Meaning of Section 6 in the Light of Section 404 of the 1968 Civil Rights Act (PL 90-284, 82 Stat. 79).*

Our next submission on the disclaimer issue is also, happily, short. Whatever questions might remain as to the meaning and application of § 6 have been put to rest by § 404 of the 1968 Civil Rights Act.

Our starting point is *Bryan v. Itasca County*, 426 U.S. 373.

The issue before the Court was the application of § 4 of PL 280, conferring civil jurisdiction upon Minnesota and the other four mandatory states

> "* * * Section 402 of Title IV, 25 USC § 1322 * * * tracks the language of § 4 of Pub L 280. Section 406 of Title IV, 25 USC § 1326 * * *, which provides for Indian consent, refers to 'State jurisdiction acquired pursuant

to this subchapter with respect to criminal offenses or civil causes of action. * * *' It is true, of course, that the primary interpretation of § 6 must have reference to the legislative history of the Congress that enacted it rather than to the history of the Acts of a later Congress. Nevertheless, Title IV of the 1968 Act is intimately related to § 4, as it provides the method for further state assumptions of the jurisdiction conferred by § 4, and we previously have construed the effect of legislation affecting reservation Indians in light of 'intervening' legislative enactments. Moe v. Salish & Kootenai Tribes, 425 US, at 472-475. * * * It would be difficult to suppose that Congress in 1968 intended the meaning of § 4 to vary depending upon the time and method by which particular States acquired jurisdiction. * * *'" 426 US at 386, 387.

Just as § 402 of the 1968 Act tracks § 4 of PL 280, § 404 of the 1968 Act likewise tracks § 6 of PL 280, almost word-for-word. (Section 404 is reproduced at US Br. pp. 21a, 22a.) The point made in *Bryan* is equally applicable here; it is difficult to suppose that Congress in 1968 intended the meaning of the same words to vary, depending upon the time a particular state assumes jurisdiction.

Congressional reenactments carry with them both the administrative and judicial constructions applied to their statutory predecessors. *Commissioner v. Noel*, 380 U.S. 678, 681, 682 (administrative construction) and *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 279 (judicial construction). The uniform judicial construction placed upon § 6, prior to 1968, was the same as that placed upon it later;

no constitutional amendment was necessary for a state to assume jurisdiction. *State v. Paul*, 53 Wn.2d 789,337 P.2d 33 (1959) app. dism'd. 361 US 898. *Quinault Tribe v. Gallagher*, 368 F.2d 648 (9th Cir. 1966), cert. den. 387 U.S. 907. And the construction placed on § 6 by the United States at the time of *Quinault* was this:

> "The plain purpose of Section 6, however, was "to remove any legal impediments to the assumption of * * * jurisdiction" (see S. Rep. No. 699, 83d Cong., 1st Sess., pp. 6-7; H. Rep. No. 848, 83d Cong., 1st Sess., pp. 6-8), and we believe that Congress intended thereby to leave to State law the procedure whereby impediments attributable to State law might be overcome. Washington's decision that a statute satisfies the requirement of its constitution that the cession of jurisdiction be revocable with the consent of "the people of" the State is a reasonable one, and it was properly honored by the court below."

Memorandum for the United States in *Quinault*, No. 1040, O.T. 1966, p. 7.

Section 404 of the 1968 Act incorporates this construction, be it labelled "judicial," or "administrative," or both, and thereby under *Bryan* reinforces the applicability of that construction to § 6 itself.

Nor is this all. As we shall show in detail in discussing the issue of partial jurisdiction (pp. 42-54, *infra*), during the extensive hearings which preceded the adoption of the 1968 Act, Congress was made very much aware of the complaints of some Indian Tribes in Washington, not only with respect to the

partial jurisdiction issue, but with respect to the disclaimer issue as well. What the Tribes had failed to win in court, they tried to win in Congress. But, as we shall demonstrate at pp. 46-54, *infra*, they failed in that forum as well.

6. *The Effect of the Disclaimer Clause, as Embodied in the Enabling Act and the State Constitution.*

Under our submissions so far, the precise effect of the disclaimer clause in the Enabling Act is not an issue; for whatever that effect was, PL 280 itself eliminated it. The intent of Congress in 1953, not in 1889, is the critical issue. And whether the state constitutional counterpart in Article XXVI constitutes an impediment to assuming jurisdiction, independently of the now defunct enabling act, is a moot question, because that constitutional provision has been made inoperative. Still, we discuss the problem.

There are two aspects to the problem; one geographical and the other substantive. To what type of lands does the Enabling Act's disclaimer clause apply? And what is the substantive legal effect on lands of that type?

We here take up only the first question, the geographical scope of the disclaimer clause.[34]

We start with the language of that clause:

[34]Because of our answer to this first question, the second question, relating to the substantive legal effect of the disclaimer, takes on much less practical importance. In the interest of completeness, we do discuss this second question, but in Appendix A.

> "* * * That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits *owned or held by any Indian or Indian tribes;* and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, *and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States;* * * *"
> (Emphasis supplied)

The Enabling Act language speaks of lands "owned or held by any Indian or Indian tribes;" it then speaks of "said Indian lands." It does not refer at all to lands owned or held by non-Indians, such as nontrust lands. Note also that it does not mention Indian reservations at all. It makes no distinction between Indian lands inside a reservation and those outside.

Yet the United States assumes that " * * * the territorial scope of the disclaimer provisions reaches all Indian country as defined in 18 U.S.C. 1151." U.S. Br. 40, note 26. That definition, of course, includes every acre within an Indian reservation, no matter what the state of its title. This assumption of the United States is wrong; it is completely contrary to the plain language of the disclaimer clause.

The United States further states in that same footnote:

> "But that question need not be resolved here since the 1963 Washington statute clearly pur-

> ports to reach Indians on their trust lands with respect to some matters."

"That question" is not so easily avoided. That same statute (RCW 37.12.010) also reaches Indians on non-Indian lands and non-Indians on both Indian and non-Indian lands. Even if this court should find that the disclaimer clause still has operative effect, it affects Indians on their trust lands; that is all it affects. By its terms it cannot affect the remaining reach of RCW 37.12.010. And that reach was of vital concern to the Washington legislature. Where the Indian population was concentrated—on trust lands—the legislature recognized a degree of Indian interest in self-government which the Congress ignored. The vast majority of the non-Indian population, however, lives on nontrust lands; law enforcement problems there obviously were of grave concern to the legislature as there and there only it assumed full subject matter jurisdiction without tribal consent. And that jurisdiction remains a matter of great concern to the state and the county.

III. THE WASHINGTON SYSTEM OF "PARTIAL" JURISDICTION IS AUTHORIZED BY PL 280

A. General Considerations.

1. *The Decision Which Washington Actually Made in 1963.*

Our starting point, once again, must be the decision which the Washington legislature actually

made, in 1963. See pp. 7-12, *supra*, and Wash. Br. pp. 33-36. The question to be answered is whether PL 280 permitted *that* decision.

The United States asserts:

> "If the States were free to pick and choose, there was a risk that some might not take the sour with the sweet, leaving the national government with the most burdensome obligations." U.S. Br. 73, 74.

True enough. The State of Washington, however, did not "pick and choose," or try to avoid the "sour" while taking the "sweet." It obligated and bound itself to take everything, both sweet and sour.

The State did, however, allow the tribes a limited right to "pick and choose." The national government would be completely relieved of any burdensome obligations, but only if the tribe so chose.[35] The question is whether, in allowing this tribal choice, the state violated PL 280.

2. *The Meaning of "In Such Manner" in Section 7.*

The United States misses the mark again in its discussion of § 7, which permits an option state "to

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[35]Even if the Tribe did not so choose, the State effectively ended up with the bulk of the sour, and thereby relieved the federal government of its most burdensome obligations in any case. On the Yakima reservation, for example, for offenses by non-Indians, law enforcement is completely a state responsibility. And the non-Indian population outnumbers the Indian by a factor of almost eight to one. Further, on nontrust lands, the state has complete responsibility for law enforcement, whether the offender be Indian or non-Indian. The federal government is left only with responsibility for offenses by Indians—numbering about 3,000—on trust lands. But even a large chunk of that responsibility has been assumed by the state, viz., traffic offenses. The remaining seven of the eight enumerated areas of jurisdiction involve primarily social services of various kinds—all of which are provided by the State.

assume jurisdiction at such time and *in such manner* as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof."

The United States asserts:

"But 'in such manner' cannot be made to do service for 'to such extent.' " U.S. Br. 70. That is not quite the point.

The United States gives its own explanation of the phrase in the sentence immediately preceding the one just quoted. And, strangely enough, it finally hits the mark.

"We may assume that 'in such manner' also condoned a procedure whereby the consent of the affected Tribes would be made a condition of assuming jurisdiction." U.S. Br. 70.

This is our point exactly; and Washington has adopted such a procedure. It did not, it is true, condition *all* jurisdiction on tribal consent. Some was so conditioned, and some was not. But that too, we submit, was permissible under the phrase, "in such manner." Nothing in that phrase suggests that a State which wishes to adopt tribal consent as a condition is required to do so either totally, or not at all.

3. *The Overall Goal of PL 280.*

The United States, quite correctly, insists that the overall goal of the Congress in enacting PL 280 was "to pull down the reservation fences that kept

out State law." US Br. 73. We make the exact same point in our discussion of the disclaimer issue. And again quite correctly, the United States continues: "That goal, obviously enough, argued for the fullest assertion of State jurisdiction." Ibid.

But did that goal, as embodied in PL 280, prohibit a state from leaving to the tribes an element of choice, as Washington has done? The United States appears to concede that conditioning *any* jurisdiction on tribal consent, as did Washington in its 1957 Act, would be consistent with that goal. As we have just seen, that is precisely the United States' reading of the phrase "in such manner." But as shown by Washington's experience under the 1957 Act, the result on many reservations was no transfer of jurisdicton at all. The congressional goal was completely frustrated on those reservations.

Why then should a state be prohibited by PL 280 from adopting a system—as Washington did in 1963—which would result in at least partial attainment of that goal and, the Tribe willing, complete attainment?[36]

It would be completely unrealistic for us to suggest, of course, that the Congress in 1953 consciously considered the precise system which Washington would adopt in 1963. Similarly, it is completely un-

[36]The irony in the position of the United States should not go unnoticed. The United States fashions an argument based upon the admitted goal of "pull[ing] down the reservation fences that kept out State law." U.S. Br. 73. Yet acceptance of that argument would result in the complete reconstruction of these fences, and absolute frustration of that goal.

realistic for the United States and the Tribe to suggest that the same Congress consciously considered and rejected it.

Fortunately, however, we need not treat the problem solely as one of attempting to discern Congressional foresight. For in 1968, Congress acted again, with the benefit of a great amount of hindsight. Between 1963 and 1968, the appropriate committees of Congress were made quite aware of what Washington had done in 1963; the Indians missed no chance to tell them. And in 1968, the Congress deliberately chose to preserve the *status quo*. There were to be no more assumptions of state jurisdiction, at least without tribal consent. But prior assumptions were to be kept intact. Congress declared a draw.

We turn briefly to that 1968 action by the Congress and its background.

B. **The significance of Section 403 of the Civil Rights Act of 1968.**

Section 403 reads as follows:

"(a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.
(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal."

The relevance of § 403, we admit, rests upon a presumption. We presume that the drafters of this provision had some very specific ideas about its scope and effect. Because both subsections of 403 refer to § 7 of PL 280, we further presume that the drafters had some very specific ideas about the scope and effect of § 7 itself.

The approach of the United States, in contrast, seems to be this: "What Congress thought about the scope and effect of section 7 in *1968* is legally irrelevant. What Congress thought in *1953* is the only real issue; and we really can't know that until the Court tells us, in this very case."

Note the United States in effect is now saying to the Congress itself: "When you enacted section 403, and were presumably deciding what you were accomplishing by enacting it, you were not entitled to rely upon our statements to you, in 1963 (Wash. Br. App. A) and again in 1968 (Wash Br. App. B), that PL 280 authorized partial jurisdiction. Nor were you entitled to rely upon the decision of the Ninth Circuit in *Quinault*, which squarely held that the jurisdictional system adopted by Washington in 1963, was valid under PL 280, and which we said was correct in our Memorandum to the Supreme Court." *Cf.* Memorandum for the United States in *Quinault*, No. 1040, O.T. 1966.

Such an approach, we submit, is completely contrary to that utilized by this Court in *Bryan v. Itasca County, supra.* (See pp. 37-39, supra) Further, the approach of the United States would mean, as a practical matter, that the Congress in 1968 was operating in the dark. It could not know what it was really accomplishing in 1968 unless and until this court later told it what it had accomplished back in *1953*, in enacting § 7 in the first place.

We suggest that the Congress in 1968 was entitled to have its own ideas as to the effect of § 7, when it embodied them in § 403, and that the intent of Congress in 1968 on this question is not only relevant, but controlling.[37] Section 403 was intended to have effect in certain states; which ones were they? Was Washington included?

In answering this question, the relationship between subsections (a) and (b) becomes important. If Washington is within the scope of subsection (a), it must be within the scope of subsection (b) as well —and vice versa. The reference in both to § 7 of PL 280 either brings Washington into the scope of both, or into the scope of neither. (The references to 18 U.S.C. 1162 and 28 U.S.C. 1360 in subsection (a) apply, of course, only to mandatory states. And there

[37]Under such cases as *Douglas v. Seacoast Products*, 431 U.S. 265, the Congress is presumed to be aware of—and indeed to have adopted —intervening judicial decisions when it reenacts a statute in substantially the same form as originally enacted. Our argument here is similar; Congress may be presumed to have been aware of intervening events, and to have taken them into account in 1968. As we shall show in our discussion of the legislative history of the 1968 Act, we here have more than just a presumption. (See pp. 49-54, infra)

is no reference in either subsection to § 6 of PL 280.)

This absence of a reference to § 6 is significant. Subsection (a) was obviously intended to include all states which had assumed jurisdiction under PL 280, whether they be optional or mandatory, and, if optional, whether they be disclaimer states or not. But if subsection (a) be all-inclusive— as surely it must be—two conclusions follow. First, the argument of the Tribe that § 7 has nothing to do with Washington is clearly wrong. (Tr. Br. 43, n. 56)[38]

Secondly, subsection (b) as well must be applicable to Washington. For the reasons previously stated, Washington cannot be within the scope of subsection (a), but outside the scope of subsection (b).

The legislative history compels the same conclusion; Washington was within the scope of subsection (b), and that subsection, accordingly, preserved the *status quo* in Washington.

The language of § 403 first appeared as § 3 of S. 966; see Hearings on Constitutional Rights of the American Indian Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. (1965) (hereafter "1965 Hearings"), pp. 9, 10. Senator Ervin was the

[38]The Tribe contends that only § 6, not & 7, is applicable to Washington. But § 6 was not repealed; and § 6, of course, does not require tribal consent as a condition for assumption of state jurisdiction. Under the Tribe's argument, Washington can now apparently take total jurisdiction without tribal consent, just so long as it amended its constitution. Such a result is absurd, of course, but it necessarily follows from the Tribe's premise.

prime sponsor of S. 966, and the explanation submitted along with his bill stated as follows:

> "Section 3 authorizes States, that have acquired civil and criminal jurisdiction over Indian country, to relinquish such jurisdiction to the United States.
>
> "This section repeals Public Law 280, which grants civil and criminal jurisdiction to States, but will not affect any cession of jurisdiction to a State prior to its date of repeal." (1965 Hearings, p. 11)

Mr. Arthur Lazarus, a prominent tribal attorney, stated his understanding as follows:

> "S. 966 *would not change the status quo in any State which already had taken over jurisdiction on Indian reservations pursuant to Public Law 280.* If such a State subsequently decided that it had made a mistake in taking over law enforcement in Indian country, however, the bill would authorize the United States 'to accept a retrocession' of that jurisdiction." (Emphasis supplied) (1965 Hearings, p. 67.)

Neither in Senator Ervin's explanation nor in that of Mr. Lazarus is there even a hint that the *status quo* was to be preserved in some states but not in others, such as Washington.

More importantly, the Yakimas themselves understood that S. 966 applied to them, for they fully supported it; and they further understood precisely the effect of § 3(b); for they wanted to change it. As they said in their formal statement:

> "In regard to S. 966, the Yakima Tribe does wholeheartedly support this legislation. *It would seem that provision should be further made that tribes now within State jurisdiction, without their consent, should be allowed to withdraw by petition to the Governor.*" (Emphasis supplied) (1965 Hearings, p. 245.)

Senator Ervin understood exactly what the Yakimas desired. Mr. Robert Jim, Chairman of the Yakima Law and Order Committee, is testifying:

> "Senator ERVIN. As I understand it, you think that no State should be permitted to assume jurisdiction over any tribe without the consent of the tribe.
>
> Mr. JIM. Yes.
>
> Senator ERVIN. And you favor the bill which has that provision in it. You would go further. You ask for the passage of a law which would give tribes the privilege of withdrawing from State jurisdiction when they have been made subject to State jurisdiction without their consent.
>
> Mr. JIM. Yes, sir." (1965 Hearings, p. 254.)

The Yakimas did not obtain the change they wanted, either then or later. Section 3(a) remained their only avenue for withdrawal.

The Makahs, a Washington tribe which has never consented to PL 280 jurisdiction, also understood that S. 966 applied to them. While the tribe did not focus on § 3(b) of S. 966, it did focus on § 3(a) (1965 Hearings, pp. 356-358) and found serious problems with it, as indeed the Tribe did with the whole bill.

> "However, while the principle of securing consent is admirable and has long been an objective of the various Indian tribes of the United

States, we must say that we feel that Senate bill 966 in its present form leaves most of the basic problems of Public Law 280 virtually untouched." (1965 Hearings, p. 356.)

In its comments on S. 966, the Interior Department did not focus on § 3(b). (1965 Hearings, p. 321) However, it will be recalled that in 1963, Interior had told the Chairman of the Senate Interior Committee that, in its view, PL 280 allowed partial jurisdiction by geographical area or subject matter. (Wash. Br. App. A) Thus the Senate could safely presume, in 1965, that Interior viewed Washington's jurisdictional system, as applied to the Yakimas, as well within the scope of § 7 of PL 280 and therefore within the scope of § 3(a) and (b) of S. 966 as well.[39]

The disclaimer problem did not escape notice during the 1965 hearings. The Quinaults, the Yakimas, the Washington State Indian Council, and the Makahs all argued that Washington was required to amend its constitution in order to assume any jurisdiction under PL 280. (1965 Hearings, p. 101 (Quinaults), p. 242 (Yakimas), pp. 246, 247 (Washington State Indian Council), p. 357 (Makahs)). They all argued to no avail.

Observe also that the committee was familiar with the jurisdictional system adopted by Washington in 1963; for the Yakimas had discussed it extensively. (1965 Hearings, p. 243.) Yet nothing was done to satisfy these complaints, save what had already been done in S. 966. Further assumptions of jurisdiction could be taken only with tribal consent; but prior assumptions could be voided only with state consent under § 3(a). So far as the 1965 Hearings reveal, that was all that was done for the Washington tribes. The *status quo* was still preserved, under § 3(b).

[39]The federal government has changed its view on this question only with *this* case. Cf. US v John, ... U.S. ....., decided June 23, 1978.

We turn to the 1968 hearings in the House, Hearings on H.R. 15419 and Related Bills Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 90th Cong., 2d Sess. (1968). (Hereafter, "1968 Hearings")

The bills under consideration were S. 1843, which had already passed the Senate, H.R. 15122, which was identical, and a similar bill, H.R. 15419. Section 3 of S. 966 had become § 303 of the first two bills, S. 1843 and H.R. 15122.

The House Committee in 1968, like the Senate Committee in 1965, knew exactly the jurisdictional system adopted by Washington in 1963. Interior described that system in a letter to the committee and enclosed a copy of the Washington statutes. (1968 Hearings, p. 29)

And once again, as was the Senate Interior Committee in 1963, the House Commiteee was informed of Interior's view as to the validity of partial jurisdiction under PL 280. Partial jurisdiction was valid and Washington was pointed out as one of the states which had taken it. (Wash. Br. App. B; 1968 Hear-

ings, p. 25.) Thus, once again, the committee in charge of the bill was led to believe by Interior that Washington's assumption of jurisdiction was valid, and would therefore fall within the language of what is now § 403.

Nor did any other witness suggest otherwise. For example, Mr. Lazarus again noted that "The proposed statute would not change the status quo in any State which had taken over jurisdiction on Indian reservations pursuant to Public Law 280." (1968 Hearings, p. 116.)

To conclude, our review of the legislative history: If that imaginary stranger we have spoken of earlier (*supra*, p. 25) had asked either the Senate Committee in 1965 or the House Committee in 1968 whether the language now found in § 403 of the 1968 Act applied to the State of Washington, the answer would have been: "Of course." And if he had further asked: "What is its effect in Washington?" the answer would have been: "To preserve the *status quo*."

IV. THE TRIBE'S ASSERTIONS THAT RCW 37.12.010 IS VAGUE AND THAT PL 280 DOES NOT APPLY TO THE YAKIMAS ARE NOT LEGITIMATE ISSUES IN THIS CASE.

The Tribe asserts that RCW 37.12.010 should be declared void as violative of the standard of definiteness of the Due Process Clause of the Fourteenth Amendment. (Tr. Br. 80-83) It argues that the eight enumerated areas in that section, over which the

State has taken jurisdiction over members of the Yakima Indian Nation, even though on tribal or allotted land, are themselves vague, and that a tribal member *might* be unable to ascertain whether his conduct is punishable under the laws of the state of Washington because he or she is uncertain as to whether or not that conduct is encompassed by one or more of those eight areas.

The Tribe also urges that jurisdiction assumed by the State of Washington pursuant to PL 280 is invalid because PL 280 itself is inapplicable to the Tribe by reason of certain treaty provisions. (Tr. Br. 29-38.)

As a threshhold matter, these questions should not now be considered by the court. In its order of February 27, 1978, noting probable jurisdiction, the court directed the parties to address the following issue:

> "Whether the partial geographic and subject matter jurisdiction exercised by the State of Washington within the Yakima Indian Reservation pursuant to Public Law 280 violates either the statutory requirements of Public Law 280 or the Equal Protection Clause of the Fourteenth Amendment."

Nowhere in that order is the due process clause in general, or the question of vagueness in particular, mentioned. The court has thus limited the issues to be discussed to those specifically set out in the order.

Likewise, nowhere in that order is the question

asked, "Does Public Law 280 violate the terms of the Yakima Treaty?"

Nevertheless, we briefly examine the merits of both questions.

A. **The Vagueness Question.**

The Tribe itself does not have standing to challenge the Washington Act as vague. The Yakima Tribe is not a defendant charged with having violated a crime, and it is highly doubtful that the Tribe, as an entity, could ever be a criminal defendant. It is instead seeking a declaratory judgment that the act is void because some future criminal defendant *might* be charged with a crime for which he *might* not have received adequate notice of criminal nature. This court has clearly stated that in such a case relief does not lie. See *Younger v. Harris*, 401 U.S. 37; *Samuels v. Mackell*, 401 U.S. 66; and *Boyle v. Landry*, 401 U.S. 77, all decided on the same date in 1971. Taken together, those cases clearly stand for two propositions: First, that one challenging a state statute for vagueness must have been charged under that statute to have standing to challenge it; and, secondly, that the proper manner for presenting a vagueness question is as a defense to the criminal charges in state court, followed ultimately, if necessary, by an appeal to this court. That is also the proper way of challenging the supposed vagueness of RCW 37.12.010. It is inappropriate for this court to render a decision on the definiteness or vagueness of

RCW 37.12.010, before the state courts have ever had an opportunity to, or indeed have been asked to, construe the statute.[40]

Tribal reliance on *Bigelow v. Virginia*, 421 U.S. 809 is misplaced. In that case this Court simply held that the offending Virginia statute was overbroad as to Mr. Bigelow himself, who, indeed, had already been convicted and sentenced under the statute. This case, in contrast, involves only a suit for declaratory relief; criminal charges have not been filed here.

Even if vagueness were a legitimate issue in this case, and if the Tribe had standing to assert it, the statute could not be found to run afoul of the vagueness doctrine. As the trial court correctly pointed out, the statue does not define crimes, it merely authorizes the extension of state jurisdiction. See, Trial Court Opinion on Motions for Summary Judgment, App. p. 8. To indicate the areas to which the State was extending its jurisdiction over Indians on their trust lands, in all cases, the legislature used either explicit language, such as "operation of motor vehicles upon the public streets, alleys, roads and highways:," or phrases of common understanding, such as "mental illness" and "juvenile delinquency." That language is certainly no less clear than the phrase "unreasonably low prices," approved by this Court in *U.S. v. Na-*

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[40]See also The Void For Vagueness Doctrine In The Supreme Court, 109 Univ. of Pa. Law Review 67 (1960), by Professor Anthony G. Amsterdam. The author discusses the question of standing to argue vagueness on pp. 97-104 of the note, and concludes that in order to challenge a statute as vague or overreaching, a litigant must still be one *as to whom it is vague* or whom it may overreach.

tional Dairy Products Corp., 372 U.S. 29 or "non-Indian community," discussed by the Court in *U.S. v. Mazurie*, 419 U.S. 544, a term which defined jurisdictional limits, as does the language complained of here.

If the Tribe's argument is taken to its logical extreme, in order to have legislated constitutionally in assuming jurisdiction, the State would have been required not only to state in what areas it was assuming jurisdiction, but also to specifically set forth those sections of state laws which prescribe criminal penalties for forbidden conduct. For example, under the tribal argument, to give a member of the Tribe reasonable notice that the State intended to exercise its jurisdiction when one attained the status of "juvenile delinquency,"[41] it would be necessary to set out in detail the dozens of sections found in Title 13 RCW, "Juvenile Courts and Juvenile Delinquents," or to set out in detail and define the numerous kinds of conduct which would constitute criminal offenses or which might otherwise place one in the status of being a juvenile delinquent. This would require hundreds of pages. The constitution does not require impossible standards. *U.S. v. Petrillo*, 332 U.S. 1 (1947).

[41]We here emphasize that "juvenile delinquency" is a *status;* and that status can be acquired by violating even *federal* law. See, *e.g.*, RCW 13.40.020(11) and (14). *Cf.*, also RCW 13.40.240. Thus, contrary to the suggestion of the United States (U.S. Br. Appendix B, Chart 2), a minor Indian son who, along with his father, commits burglary on trust lands has, like his father, violated 18 U.S.C. 1153, the Major Crimes Act, and not state law. But that son, because of his status, is subject to the procedures contained, *e.g.*, in chapter 13.40 RCW, which are essentially rehabilitative in nature.

B. The Applicability of PL 280 to the Yakimas.

The Tribe asserts that Congress did not expressly abrogate its purported treaty right of self-government, (Tr. Br. 30-36) and that Congress cannot delegate its federal duty to Indians to the states. (Tr. Br. 36-38)[42]

Congress' power to allow the states to increase jurisdiction over Indians, even to the exclusion of tribal powers of self-government, cannot be doubted. It is undisputed that Congress has plenary authority to legislate for the Indian tribes in all matters, including this form of government, *U.S. Wheeler*, ... U.S. ....., decided March 22, 1978. It is also clear that Congress can nullify the effects of a treaty's provisions, without rewriting the treaty.

In *Lonewolf v. Hitchcock*, 187 U.S. 553, 566, 568, this Court, dealing with the validity of accession of tribal lands enacted in contravention of a treaty requiring three-fourths Indian consent, held:

> The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interests of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians

[42]We here assume that the Tribe is asserting invalidity only as to federal authorization of state jurisdiction over Indians. (Tr. Br. 20) Congress' transfer to the states of jurisdiction over non-Indians does not affect any tribal interest in self-government. *Oliphant v. The Suquamish Indian Tribe*, ... U.S. ....., decided March 6, 1978.

it was never doubted that the power to abrogate existed in Congress. * * *
* * *
* * * In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation.

See, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 594.

The Tribe contends that, while Congress' power cannot be doubted, the question is whether the congressional intent manifested in PL 280 supported a finding of abrogation of the supposed treaty right of self-government. In all cases, the face of the act, the surrounding circumstances and the legislative history are to be examined to determine what congressional intent was. *Rosebud Sioux Tribe*, supra at 587.

We have sufficiently examined these factors in prior portions of this brief, pp. 22-33, supra; they all lead to one conclusion: Congress intended that PL 280 be applicable to *all* states and to *all* reservations, except to the extent reservations were expressly excluded, as in §§ 2 and 4 of PL 280. S. Rep. No. 699, 83rd Cong. 1st Sess. (1953) pp. 5-6.[43]

V. ALTERNATIVE POSSIBLE DISPOSITIONS.

If our principal submissions are correct, the disposition of this case is simple. The court below should be reversed, and the judgment of the trial court reinstated. If, however, certain of those submissions are

[43]The Senate Report adopts the House Committee Report on PL 280, H. Rep. No. 848, verbatim.

rejected, the appropriate disposition becomes a more complicated matter. For that disposition should not be a complete invalidation of the Washington jurisdictional system.

We here discuss the alternatives.

A. The Disclaimer Issue.

If the disclaimer clause, as embodied in the Enabling Act, remains in force, that force should be limited to the terms of the clause. And under those terms, the clause is limited in its application to Indian or trust lands, and to Indians thereon. Accordingly, the only portion of the State's jurisdiction over the Yakima reservation which is affected by this argument is the eight enumerated subject matters on trust lands; the remaining reach of RCW 37.12.010 is still valid. And we consider this remainder a vital element of Washington's jurisdictional system—to non-Indians wherever they be found, and to Indians on nontrust lands, which in all likelihood will be non-Indian lands.

True, the State would face some difficulties, *e.g.*, in attempting to prosecute for welfare fraud and in enforcing the compulsory school attendance laws. But the State would still provide social and welfare services to the Indian. The consequences would not be so disastrous as they would be if the entire reach of the jurisdictional scheme were invalidated.

B. **The Partial Jurisdiction Issue.**

If Washington's partial jurisdiction by subject matter is held to violate the terms of PL 280, the result would be that described above: Only the eight enumerated subject matters would be stricken.

If, however, Washington's partial jurisdiction by geographical area, as well as its partial jurisdiction by subject matter, is held to violate PL 280, a more difficult problem is presented. The alternatives, we believe, would be invalidation of the jurisdictional system *in toto*, or the severance of the tribal option. Under the second alternative, RCW 37.12.010 would, in effect, read as follows:

> "The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session) * * *"

If the choices given the states by Congress in passing PL 280 were only two, everything or nothing, and if the overriding goal of Congress was a transfer of everything from the federal government to the State, severance of the tribal option would be consistent with PL 280 and would certainly accomplish that goal.

The court below assumed that any severability issue is to be "determined by state standards." Juris. St. App. A, p. 35, n. 9. We believe this assumption to be correct.

We would not hazard prediction as to how the state supreme court would decide this severability issue. But it could well be guided by RCW 37.12.050, which states:

> "The jurisdiction assumed pursuant to this chapter shall be subject to the limitations and provisions of the federal act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session.)

This language could well be an indication to the supreme court that the goal of Congress in passing PL 280 was the goal of the state legislature as well, and that once the "limitations and provisions" of PL 280 have been made clear by this Court, only the offending portions of the statute should be severed, so that the common goal would be accomplished.

In short, a proper disposition by this Court would be a remand to the Court of Appeals, with directions to refer the severability question to the state supreme court.[44]

[44]This referral could be made under chapter 2.60 RCW, the Federal Court Local Law Certificate Procedure Act.

CONCLUSION

In 1963 the Washington legislature was faced with a serious problem, affecting both its Indian and its non-Indian citizens. Both groups of citizens live together on Indian reservations and both, of course, participate fully in the lawmaking process of the state of Washington. They elect its legislators and its local officials, including sheriffs, prosecutors and judges. That these officials would be sensitive to the interests of both groups is only as expected.

In accommodating the interests of both groups, the legislature determined that state law should apply on those portions of reservations owned and occupied primarily by non-Indians, but that tribal choice as to applicable law should largely control on the Indian-owned portions of those reservations. It removed from that tribal choice only certain subject matters of obvious state concern, involving mainly various social services provided by the State.

The United States Department of Justice, unlike the Washington legislature, totally ignores the interests of all of the non-Indian citizens living on Indian reservations, just as it did in *Oliphant v. Suquamish Tribe*, ... U.S. ....., decided March 6, 1978. The Department's position here represents an unfortunate and recent about-face. Just as the United States had asserted for more than a century prior to *Oliphant* that tribal criminal law did not apply to non-Indians, so here the United States, from the passage

of PL 280 until the filing of this appeal, has told both Congress and this Court that Washington's jurisdictional system was valid.

The United States asserts that if Washington's system be invalidated *in toto* "* * * the 'unsettling' effect will be minimal and * * * the benefits would be substantial * * *." (U.S. Br. 11) We must ask: "For whom?" Certainly not for the non-Indians. Nowhere in its discussion of the "Practical and equitable considerations" does the United States so much as mention the impact upon non-Indians. (U.S. Br. 54-59, 87-88) From reading these pages one would assume that the 22,000 non-Indians on the Yakima Reservation and the even greater number on other reservations simply do not exist.

But they do exist. And the Washington legislature, in 1963, took a far broader and fairer view than does the United States now. The legislature devised a jurisdictional system which took the interests of both groups into account, and accordingly preserved, to the maximum degree feasible, Indian self-government. PL 280 did not require the legislature to do so; but neither did it prohibit the legislature from doing so.

The disclaimer issue aside, Washington's jurisdictional system would be unquestionably valid, ironically enough, had the legislature totally ignored the interests of the Indians and eliminated completely any element of tribal choice.

The system actually adopted is now under attack. And the basis of the attack is the legislature's decision *not* to ignore the Indians' interests, and to preserve, instead, Indian self-government. The attack should be rejected.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September, 1978, three copies of the Reply Brief for Appellants were mailed, postage prepaid, to James B. Hovis, Attorney at Law, 316 North Third Street, Yakima, Washington, 98907, counsel for appellee. I further certify that all parties required to be served have been served.

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APPENDIX A

THE MEANING OF THE PHRASE "ABSOLUTE JURISDICTION AND CONTROL" AS USED IN THE DISCLAIMER CLAUSE

The disclaimer clause reads:

> "* * * That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; * * *"

Does the language of this clause encompass jurisdiction of the type contemplated by PL 280? The United States, of course, contends that it does.

> "On its face, the provision plainly requires the new States to disclaim *both* any property interest over "Indian lands" *and* any jurisdiction to impose their own laws there." U.S. Br. 40. (Emphasis in original)

This distinction and the argument based upon it are not at all new, as seen from reading the case cited in the United State's very next sentence, *Draper v. United States*, 164 U.S. 240. (U.S. Br. 41)

The Court stated the argument as follows:

> "It is argued that as the first portion of the section in which the language relied on is found disclaims all right and title of the state to "the unappropriated public lands lying within the

boundaries thereof and of all lands lying within said limits, owned or held by an Indian or Indian tribes, and until the title thereof shall be extinguished by the United States, the same shall be and remain subject to the disposition of the United States," *therefore the subsequent words, "and said lands shall remain under the absolute jurisdiction and control of the United States," are rendered purely tautological and meaningless, unless they signify something more than the reservation of authority of the United States over the lands themselves and the title thereto."* 164 U.S. 245. (Emphasis supplied)

In rejecting this argument, the Court adopted a rationale which has a direct bearing on our question. The United States explains *Draper* as "carving out [a] special exception[s]" limited to offenses by a non-Indian against another Indian, as in *McBratney*. But the rationale of *Draper*, rather than providing an exception, destroys the rule itself.

After stating the argument as above, the Court continued:

> "This argument overlooks not only the particular action of Congress as to the Crow reservation, but also the state of the general law of the United States, as to Indian reservations, at the time of the admission of Montana into the Union." 164 U.S. at 245.

The "general law of the United States, as to Indian reservations" refers to the General Allotment Act of 1887, 24 Stat. 388, adopted two years before the Montana (and Washington) Enabling Act. The General Allotment Act "* * * contemplated the gradual extinction of Indian reservations and Indian

titles by the allotment of such lands to the Indians in severalty." 164 U.S. at 246. And § 6 of the Act provided that simultaneously with the allotment process, the Indian allottees would "* * * be subject to the laws, both civil and criminal, of the state or territory in which they may reside." 164 U.S. at 246. The policy, in short, was a drastic one. The reservations and the tribes were to be broken up, and their members completely assimilated into non-Indian society.

At the same time, however, the Act placed restrictions on the power of the Indians to alienate their lands; a trust period was imposed. The purpose of the disclaimer clause was to "prevent any implication" (164 U.S. 246) that once jurisdiction was transferred under § 6, the state thereby gained any power to affect the Indian title by overriding these restrictions. State jurisdiction was to be complete, with one exception; federal jurisdiction was to control with respect to Indian title, until after expiration of the restrictions. (174 U.S. 246)[1] The purpose of the disclaimer clause was to assure preservation of these restrictions until they expired by their own terms.

The reason for the failure of the disclaimer clause to make any distinction between lands within and lands outside a reservation is also explained by the court. Under § 4 of the General Allotment Act,

[1]Observe that § 6 became effective *before* the expiration of the restrictions, not after. The apparent suggestion in our opening brief to the contrary (Wash. Br. 37, text accompanying note 15) is incorrect.

off-reservation Indians were to receive allotments, subject to the same restrictions on alienation as on-reservation allotments. The protection of the disclaimer clause was to cover these off-reservation lands as well. (164 U.S. 246)

The disclaimer clause, then, was designed for a situation in which "the Indians themselves would have passed under the authority and control of the state," 164 U.S. at 246, but their lands would remain subject to federal jurisdiction and control, *i.e.*, subject to the restrictions on alienation. Far from erecting barriers to general state jurisdiction over "the Indians themselves," the disclaimer clause contemplated a situation in which those barriers had been removed.[2]

So far as PL 280 is concerned, the disclaimer issue is settled. See pp. 18-22, supra. But if it is to be reopened, and if the meaning of the disclaimer language in the Washington Enabling Act becomes a question, *Draper* is dispositive on that question.

The United States is correct in suggesting that the Court has over the years "noticed" the disclaimer clauses and "treated" them as reserving to the United States jurisdiction of the type contemplated by PL 280. (U.S. Br. 42, and cases cited at pp. 42, 43)

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[2]The Dakota delegate, quoted at U.S. Br. 45, understood the effect of the disclaimer clause to be exactly as we have described it. "We are to recognize tribal relations in connection with Indians for only a very short time longer," i.e., until allotments were made in severalty, and § 6 was thereby triggered. But, with respect to the land itself, "* * * we cannot even lay out a highway over it * * * [or] exercise any right of emiment domain over the land. * * *" (20 Cong. Rec. 813 (1889)) The Dakota delegate was correct on all these points.

However, in those cases in which the meaning and effect of the disclaimer clause has been critical in the disposition of the case, the Court has examined that meaning carefully, and concluded that it does not contemplate PL 280 type jurisdiction. See *Draper*, *Village of Kake v. Egan*, 369 U.S. 60 and its companion case, *Metakatla Indian Community v. Egan*, 369 U.S. 45.

Admittedly, there is still some confusion because of *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, at 176, n. 15, in which the *Kake* construction of the Alaska disclaimer was stated to be applicable only to non-reservation Indians. This statement in *McClanahan* overlooked the fact that the *Kake* construction was applied to *reservation* Indians in the companion case, *Metlakatla*. If the drafters of PL 280 were confused as to the correct meaning of the disclaimer clause, it is perfectly understandable. *Kake* and *Metlakatla* had not yet been decided. Indeed, the drafters might have reason to be confused even now, after the *McClanahan* gloss on *Kake*. The confusion can be dispelled by going back to *Draper*.

One last point. Adoption of the *Draper* and *Kake* construction of the disclaimer language would not result in the automatic removal of the federal barriers to state jurisdiction over reservation Indians in disclaimer states. For those barriers are created independently of any disclaimer clause. (*Cf.*, U.S. Br. 42) Thus, we have no disagreement at all with the statement in *McClanahan:*

> "It [the *Kake* holding] did not purport to provide guidelines for the exercise of state authority in areas *set aside by treaty for the exclusive use and control of the Indians.*" 411 U.S. at 176, n. 15. (Emphasis supplied)

As shown by *Metlakatla* itself, which involved a reservation created by statute (48 U.S.C. 358), though the disclaimer clause itself creates no barriers to state jurisdiction of the type envisioned by PL 280, such barriers certainly exist. They are created either by treaty provisions, as in *McClanahan*, or by statute (or administrative action thereunder) as in *Metlakatla*. The *Kake* and *Draper* construction of the disclaimer clause does not even purport to remove such barriers; they can be removed only by an act of Congress, such as PL 280.